BEST BEST & KRIEGER LLP
ATTORNEYS AT LAW

Robert M. Sawyer
(916) 551-2845
robert.sawyer@bbklaw.com
File#: 19916.00004

400 Capitol Mall, Suite 1650
Sacramento, CA 95814
Phone: (916) 325-4000
Fax: (916) 325-4010
bbklaw.com

June 24, 2011

Charles R. Hoppin
Chair, State Water Resources Control Board
P.O. Box 2000
Sacramento, CA 95812-2000

Statement of Friant Water Authority
Following June 6, 2011 Additional Scoping Meeting re
Current Review of the 2006 Water Quality Control Plan for the San Francisco Bay/Sacramento-San Joaquin Delta Estuary
Southern Delta Salinity and San Joaquin River Flow Objectives
SOUTHERN DELTA AG AND SJR FLOW REVISED NOP

THE STATE WATER RESOURCES CONTROL BOARD IS CORRECT IN DEFERRING REVIEW OF THE UPPER SAN JOAQUIN RIVER IN ITS CURRENT PROCESS

Dear Chair Hoppin,

A. INTRODUCTION

On May 23, 2011, on behalf of its 20 water agency members, and through its General Counsel, Ruddell Cochran Stanton Smith Bixler & Wisehart LLP, the Friant Water Authority ("FWA") timely submitted to the State Water Resources Control Board ("SWRCB") its written comments in connection with this matter. On June 6, 2011, by its Resources Manager, William Luce, P.E., and its undersigned Special Counsel, FWA personally attended and participated in SWRCB's Additional Scoping Meeting.

SWRCB has previously determined that in its determination of the amounts of flow required to implement its objectives for fish and wildlife, it will not be including at this time the upper San Joaquin River, i.e., the San Joaquin River above its confluence with the Merced River ("USJR"). Rather, evaluation of any need for additional flows from the USJR will be deferred until subsequent review of the Bay-Delta Plan.[1]

[1]. See, e.g., Footnote No. 1, at Page 3, in SWRCB's Revised Notice of Preparation and Notice of Additional Scoping Meeting, in which it is stated that "Currently, the upper San Joaquin River does not support salmon runs upstream of the Merced River confluence (upper San Joaquin River). However, pursuant to the San Joaquin River Restoration Program (SJRRP), spring-run chinook salmon are planned to be reintroduced to the upper San Joaquin River no later than December 31, 2012. Flows need to support this reintroduction are being determined and provided through the SJRRP. During the next review of the Bay-Delta Plan, the State Water Board will consider information made available through the SJRRP process, and any other pertinent sources of information, in evaluating the need for any additional flows from the upper San Joaquin River Basin to contribute to the narrative San Joaquin River flow objective."

In written comments to SWRCB a number of interested parties have questioned the wisdom of this approach. The purpose of this letter is to confirm that SWRCB's position with respect to USJR flows makes the most sense from every standpoint from which it may be viewed, be it practical, legal, regulatory, environmental or managerial.

B. FRIANT DAM

As you know, intense development of the USJR for irrigation began nearly 150 years ago with Miller & Lux's construction of the first Sack and Mendota Dams. As early as 1928, the California Department of Fish and Game determined that very few salmon remained in the San Joaquin River above the Merced River, the historic fishery having been severely depleted by that time. With the completion of Friant Dam in the 1940s, a long stretch of the USJR was left completely dry in all but the very wettest years. While it made maintenance of salmon fisheries impossible, this dewatering of the San Joaquin River was determined to be a reasonable exchange for "refreshing" the important farmlands of the east side of the San Joaquin Valley.[2]

Recognizing the importance of San Joaquin Valley agriculture, in 1943 the California Legislature enacted a Water Code provision directing that Friant Dam was to be constructed and used "primarily for improvement of navigation, flood control, and storage and stabilization of the water supply of the San Joaquin River, for irrigation and domestic use," and only "secondarily" for hydropower and other beneficial uses.[3]

For well over half a century, the Friant Division of the Central Valley Project has been operated in accordance with SWRCB Decision 935, benefiting approximately one million acres of highly productive agricultural lands generating over $4 billion in economic activity. As well, several communities, including the City of Fresno, have been supplied critical municipal water supplies from the San Joaquin River via the Central Valley Project.

C. THE SAN JOAQUIN RIVER RESTORATION PROGRAM

In 1988 a coalition of environmental advocacy groups sued the United States and others with the goal of restoring the salmon fishery to the USJR.[4] After 18 years of litigation in the federal court system, that dispute was settled when all parties executed a court-approved and ordered Stipulation of Settlement ("Settlement"). The Settlement was subsequently adopted as federal law, in Title X, Subtitle A, of Public Law 111-11 ("Settlement Act"). Implementation of the Settlement and Settlement Act is referred to as the San Joaquin River Restoration Program ("SJRRP"), administered by the United States Bureau of Reclamation of the Department of the Interior, but involving the U.S. Fish and Wildlife Service (also part

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[2]. See, e.g., Justice Jackson's approval of Friant Dam and the Central Valley Project in the United States Supreme Court's opinion in *United States v. Gerlach Live Stock Co.*, 339 U.S. 725 (1950)

[3]. Water Code § 11226.

[4]. Natural Resources Defense Council, et al., v. Kirk Rodgers, et al., United States District Court for the Eastern District of California CIV NO. S-88-1658

of the Department of the Interior), the National Marine Fisheries Service, and the California Departments of Fish & Game and Water Resources, as implementing agencies.

The Settlement and Settlement Act have two co-equal goals: Restoration and maintenance of fish populations between Friant Dam and the Merced River, including naturally-reproducing and self-sustaining salmon ("restoration goal"), and recapture, recirculation, and other programs to reduce or completely avoid impacts to Friant contractors resulting from the increased release of flow from Friant Dam for restoration purposes ("water management goal").

The Settlement is intended also to provide certainty with respect to a flow regime and costs of implementation. Those certainties were key considerations when the non-federal defendants (numerous Friant Division water contractors and the Friant Water Authority) agreed to the Settlement.

A key component of the Settlement and the Settlement Act is express recognition of Section 3406(c)(1) of the Central Valley Project Improvement Act (Public Law 102-575), which requires that the Secretary of the Interior prepare and implement a "comprehensive," "reasonable," "prudent" and "feasible" plan to among other things "address fish, wildlife, and habitat concerns on the San Joaquin River" That plan is to include "water quality improvements that will be needed to reestablish where necessary and sustain naturally reproducing anadromous fisheries from Friant Dam to its confluence with the San Francisco Bay/Sacramento-San Joaquin Delta Estuary." By Section 10007 of the Settlement Act, the U.S. Congress determined that implementation of the Settlement will be the very method by which the Secretary of the Interior satisfies and discharges this obligation.

In other words, when it passed the Central Valley Project Improvement Act in 1992, Congress addressed one of the very issues now being addressed as part of SWRCB's Southern Delta Salinity and San Joaquin River Flow Objectives: The issue of improving flows and water quality in the USJR sufficient to restore and maintain an historic salmon fishery. When it wrote the Settlement into federal law in 2009, Congress determined by clear directive that the way that issue would be dealt with was to be the implementation of the Settlement and the SJRRP.

As you are aware, the restoration flows under the Settlement's hydrographs will be significant. For example, in each normal-dry year type, they will add nearly 250,000 acre feet to the flows that have historically been released from Friant Dam into the natural river (and which, for the most part, have historically made it only to Gravelly Ford after being fully diverted and applied to beneficial uses by riparian users above that point). In wet year types, these additional releases for fish and wildlife will exceed 555,000 acre feet.[5] And the Settlement's hydrographs were derived after significant research and consideration by a group that included well-known scientists Dr. G. Mathias Kondolf (fluvial morphology, U.C. Berkeley) and Dr. Peter B. Moyle (fish biology, U.C. Davis).

Exactly how these restoration flows will affect the USJR, as well as San Joaquin River from the Merced to the Delta, may not be known for some time. Reestablishing the fishery and improving flows and water quality for that reestablishment will be a highly structured and involved process that will

[5]. Plus "buffer flows" of up to an additional 10% when necessary for restoration purposes, as may be recommended by the Restoration Administrator appointed under the Settlement.

directly or indirectly affect the entire San Joaquin River, its tributaries, and the Delta.[6] Because of the amount of time that is expected to pass before all of the information will be available, the Secretary of the Interior will not report to Congress on the progress made in reintroducing spring-run and fall-run Chinook salmon until December 2024.[7] And except for additional water that may be secured from willing sellers, no consideration will be given to changing the agreed-upon flows until 2026.[8]

D. CONCLUSION

The Settlement, the Settlement Act, and the SJRRP address many of the same issues that SWRCB is addressing in its review of the Bay-Delta Plan. Flows in the USJR have already increased with implementation of the SJRRP's interim (research) flow program, authorized by temporary permits issued by SWRCB. Upon sufficient completion of channel improvements to allow full transmission of interim flows and restoration flows, the beneficial effects of these flows will extend beyond the Merced River and potentially into the Delta itself. We also note that this concept of establishing instream flow requirements for each stream based on the specific needs of that tributary is consistent with what others on the river are advocating in lieu of trying to establish one flow requirement at Vernalis that could potentially result in a waste of water.

While the SJRRP is already "off and running," the full significance of restoration flows and related recapture and recirculation as part of the Congressionally-approved water management goal, as well as the effectiveness of restoration flows in reestablishing the salmon fishery and benefitting other fish and wildlife (as well as water quality), may not be known for a number of years. It is for that reason that SWRCB's decision to defer consideration of the USJR until the next review of the Bay-Delta Plan, when it – and all interested parties – will have the benefit of the substantial information that the SJRRP will yield, is appropriate.

Thank you.

The Friant Water Authority
By Best Best & Krieger LLP

By _____
Robert M. Sawyer
Special Counsel

cc: Frances Spivey Weber, Vice Chair, State Water Resources Control Board
Tam M. Doduc, Member, State Water Resources Control Board
Thomas Howard, Executive Director, State Water Resources Control Board
Erin K. L. Mahaney, Senior Legal Counsel, State Water Resources Control Board
Allen Short, Coordinator, San Joaquin River Group Authority

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6. San Joaquin River Restoration Program Draft PEIS/R, Sec. 1.1.2, Page 1-3.
7. See, e.g., Executive Summary, San Joaquin River Restoration Program Draft PEIS/R, p. 4
8. Settlement, Par. 20, p. 24